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In the Supreme Court of the United States

OCTOBER TERM, 1949

No. 656

RING CONSTRUCTION CORPORATION, PETITIONER

v.

THE SECRETARY OF WAR OF THE UNITED STATES

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR RESPONDENT IN OPPOSITION

OPINIONS BELOW

The findings of fact and opinion of the Tax Court (R. 27-59) are reported at 8 T. C. 1070. The opinion of the Court of Appeals for the District of Columbia Circuit (R. 957-960) is reported at 178 F. 2d 714.

JURISDICTION

The judgment of the Court of Appeals was entered on November 7, 1949 (R. 961). Peti-

tioner's petition for rehearing filed on November 17, 1949 (R. 962-964) was denied on January 14, 1950 (R. 965). The petition for a writ of certiorari was filed March 8, 1950. The jurisdiction of this Court is invoked under 28 U. S. C. 1254(1).

QUESTIONS PRESENTED

1. Whether Section 403 (e) of the Renegotiation Act, added by Title VII of the Revenue Act of 1943, accords finality to rulings by the Tax Court on questions of law and fact, not involving jurisdictional or constitutional issues, arising in the course of that court's redetermination of the amount of a contractor's excessive profits.

2. Whether the according of such finality to a determination of the Tax Court violates the due process provision of the Fifth Amendment.

3. Whether the Renegotiation Act validly authorized the renegotiation of contracts with the War Department entered into before, but not completed or paid for until after, April 28, 1942, the date of the enactment of the original Renegotiation Act.

STATUTES INVOLVED

The pertinent provisions of the original Renegotiation Act (Sec. 403 of the Sixth Supplemental National Defense Appropriation Act, 1942, 56 Stat. 226, 245) and of its amendment by the Revenue Act of 1943 (Act of February 25, 1944, c. 63, Title VII, 58 Stat. 21, 78) are set forth in the Appendix, *infra,* pp. 21-28.

STATEMENT

Petitioner instituted this proceeding, on May 22, 1944, by filing its petition in the Tax Court of the United States for a redetermination of the unilateral determination of the Under Secretary of War that petitioner's excessive profits on two 1942 construction contracts with the War Department amounted to $1,365,000 (R. 7-12). After respondent answered (R. 25-27) and a hearing was held, based upon oral testimony, documentary evidence and agreed stipulations of fact, the Tax Court entered its decision for the Government and redetermined petitioner's excessive profits on these two contracts as $1,208,965.13 (R. 27-60). On appeal, the United States Court of Appeals for the District of Columbia Circuit affirmed (R. 957-960).

A. *Findings of the Tax Court.* The pertinent facts, as stipulated by the parties and as found by the Tax Court, may be summarized as follows (R. 28-41, 77-80):

Petitioner is a family-owned Maryland corporation, engaged in construction work, with its principal place of business in Minneapolis. (R. 28, 77.) In response to a War Department invitation of February 28, 1942, for bids to construct two areas (areas C and E) at Camp McCoy, Wisconsin, petitioner submitted a bid totalling $6,650,280 (R. 29). The bids were opened on March 26, 1942; one other bid was submitted on Area C and no other bid was received on area E (R. 29). On the same

day (March 26, 1942), petitioner signed a contract with the War Department for this work (contract No. W-1088 Eng. 1638), and the agreement was approved by the War Department on April 24, 1942 (R. 29). The agreement was in the usual fixed-price construction form, and required completion within six months; it did not contain a renegotiation clause (R. 29-30, 347-380). On October 3, 1942, petitioner and the War Department entered into another contract (No. W-1088 Eng. 1542) for additional buildings at Camp McCoy, for which petitioner had submitted a bid of $78,300 (R. 30-31). Some months after the enactment of the original Renegotiation Act on April 28, 1942, the two contracts were duly completed by petitioner, and, as payment, petitioner received from the Government (taking account of change orders and adjustments) a total of $6,918,988.51 ($6,838,412.21 on the large contract; $80,576.30 on the smaller) (R. 8, 31). The actual, allowable, and reasonable job costs on the two contracts amounted to $4,936,-172.52—exclusive of (a) compensation paid to certain executives, including Floyd and Wiik (*infra*, p. 5), (b) Wisconsin income taxes and interest thereon, (c) federal income taxes and interest thereon, (d) certain other minor expenses, and (e) profit (R. 31). Included in this total job cost was the sum of $2,949,706.03 paid by petitioner to its subcontractors (R. 31).

In the performance of these contracts petitioner employed M. A. Floyd and A. I. Wiik as superintendents and project managers under profit sharing contracts (R. 32, 78). Such contracts are customary in the construction industry and provided for the payment to Floyd and Wiik of 10 per cent of the profits on jobs each estimated and superintended (R. 32). The compensation to which Floyd and Wiik were entitled under their contracts, without giving effect to renegotiation of petitioner pursuant to the renegotiation legislation, is $110,275.32 and $102,388.91, respectively (R. 33, 79). Neither Floyd nor Wiik is related by blood or marriage to the Ring family which owns all of petitioner's stock. They were not stockholders of petitioner and, aside from the employment contracts, had no relationship to it, other than Wiik's being vice president (R. 33). The reasonable value of the services of the two men on the contracts in 1942 was found by the Tax Court to be $60,000 (R. 33).[1]

With regard to the background of the Renegotiation Act, which petitioner claimed was unconstitutional as applied to its prime contract outstanding on April 28, 1942, the Tax Court found that after Pearl Harbor the President issued a directive exempting the Army and Navy from complying with statutes requiring the award of contracts for

[1] In addition, the Tax Court made findings as to the risks assumed by petitioner, the course of the work, and the fairness of the profit made (R. 35-39).

supplies on a competitive basis. Thereafter, construction contracts were let both on a basis of competitive bidding, and without such bidding on a negotiated basis. The volume of Government contracts in general multiplied within a few months after the entry of the United States into war. At the date of the enactment of the Renegotiation Act on April 28, 1942, there were approximately fifty billion dollars of uncompleted contracts on which final payment had not been made (R. 39-40).[2]

B. *Proceedings.* After petitioner had received the full contract prices, renegotiation proceedings were duly commenced by the War Department to determine whether petitioner had made excessive profits on the two contracts in question. Petitioner participated in these proceedings under protest, and questioned the respondent's jurisdiction and authority (R. 8.) No agreement having been reached, the Under Secretary of War (to whom the Secretary of War had delegated his authority under the Renegotiation Act) issued a unilateral determination, on December 20, 1943, finding that "$1,365,000 of the profits realized by the Contractor under said contracts are excessive," and directing petitioner to repay that amount, less the appro-

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[2] Evidence was also introduced concerning the circumstances surrounding the enactment of the Renegotiation Act, similar to that which was before this Court in *Lichter* v. *United States*, 334 U.S. 742, 753-772 (cf. R. 40-1; 439-703).

priate tax credit, to the Treasurer of the United States (R. 15). Notice of this determination was given to petitioner on the same day (R. 13-14, 41).

On May 22, 1944, petitioner filed a petition in the Tax Court seeking a *de novo* determination of its excessive profits under Section 403 (e) (2), added to the Renegotiation Act by Title VII of the Revenue Act of 1943 (Appendix, *infra,* pp. 26-28). The petition attacked the constitutionality of the Renegotiation Act on the ground, *inter alia,* that it could not validly apply retroactively to its contract of March 26, 1942 (R. 9-10). It also challenged the correctness of the Under Secretary's determination (R. 10-12).

The Tax Court, on the basis of the evidence, the parties' stipulation, and its previous decision in another case, held that the Renegotiation Act was valid as applied to petitioner's contracts (R. 41-50) and that the provision vesting power in the Tax Court to decide finally the amount of excessive profits, if any, was constitutional (R. 50). It went on to determine that petitioner was entitled to a profit of about $600,000, or a little less than 12 per cent of its actual costs (R. 51-55). In arriving at this determination, the Tax Court held that the 10 per cent of the profits payable to Wiik and Floyd should be based on the $600,000 received by petitioner *after* renegotiation, in accordance with

the decision in *Floyd* v. *Ring Construction Co.*, 66 F. Supp. 436 (D. Minn.), in which case Floyd had sued petitioner for compensation based upon net profits prior to renegotiation, and had lost (R. 56). It also allowed the amount of $40,964.81 as Wisconsin State income tax on petitioner's profit of $600,000 after renegotiation (R. 58-59).

On appeal, the court below refused to consider petitioner's various assignments of error in regard to the Tax Court's determination of the amount of excessive profits (R. 958). It sustained the Act as applied to prime contracts with the Government outstanding on April 28, 1942 (R. 958-960).

ARGUMENT

1. *Tax Court Review:* In its petition for review of the Tax Court decision, filed in the court below under Section 1141 of the Internal Revenue Code, petitioner claimed *inter alia* that the Tax Court had improperly imposed the burden of proof on it and further that the Tax Court, in determining the amount of excessive profits, had erred with regard to (1) the risks assumed by the contractor and the rates of profit it should fairly earn; (2) the costs it could claim on account of the portions of the profits to be paid to Floyd and Wiik (*supra*, pp. 4-5, 7-8), and (3) the proper allowance on account of its Wisconsin income tax (*supra*, pp. 4, 8). The court below refused to pass upon these alleged errors, as beyond the jurisdiction vested in it by

Section 403 (e) added to the Renegotiation Act by Title VII of the Revenue Act of 1943 (Appendix, *infra*, pp. 26-28). Petitioner asserts that this refusal is based on an erroneous construction of Section 403 (e) (Pet. 20-21), and if this construction were proper, the "unreviewable finality" thereby given to the Tax Court's redetermination "appears to constitute a denial of due process" (Pet. 20).[3] Neither contention, we submit, has any merit.

(a) *Construction:* The court below properly refused to "stop * * * to state or examine the faults found by the petitioner with the procedure and determination of the Tax Court" (R. 958). Section 403 (e) provides that upon the filing of a petition for redetermination, the Tax Court

> shall have exclusive jurisdiction, by order, to finally determine the amount, if any, of such excessive profits received or accrued by the contractor or subcontractor, and such determination shall not be reviewed or redetermined by any court or agency.

This language is ample to vest at least "exclusive and unreviewable jurisdiction in the Tax Court to determine the amount of excessive profits, includ-

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[3] In its brief below (pp. 18-19), petitioner conceded that "there is no constitutional invalidity in the provision giving the Tax Court the final word on the subject of excessive profits." Although this concession was limited to the prospective application of the Renegotiation Acts, that limitation seems immaterial in light of the formulation of petitioner's position here.

ing questions of both law and fact in such determination." *U. S. Electrical Motors* v. *Jones,* 153 F. 2d 134, 136 (C. A. D. C.) (quoted below at R. 958); *Blanchard Machine Co.* v. *RFC Price Adjustment Board,* 177 F. 2d 727 (C. A. D. C.), certiorari denied, No. 540, this Term (March 13, 1950); see, also, *Spaulding* v. *Douglas Aircraft Co.,* 154 F. 2d 419, 427 (C. A. 9); cf. *Aircraft & Diesel Corp.* v. *Hirsch,* 331 U. S. 752, 769.[4]

We believe that other provisions of Section 403 (e), as well as its legislative history, support this conclusion; indeed, it may well be that the courts of appeals were not to review any Tax Court determinations in renegotiation matters and that the court below, in undertaking even limited review, erred in petitioner's favor.[5] Section 403 (e) goes on to provide:

> For the purposes of this subsection the court shall have the same powers and duties, insofar as applicable, in respect of the contractor, the subcontractor, the Board and the Secretary, and in respect of the attendance of witnesses

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[4] In the *U. S. Electrical Motors, Blanchard,* and the instant cases, the Court of Appeals for the District of Columbia Circuit has held that it has power to review Tax Court renegotiation decisions on matters going to the Tax Court's jurisdiction, the validity of the Renegotiation Act, and, apparently, other issues of law which the court has regarded as unrelated to questions of "amount".

[5] If certiorari is granted, the Government may affirmatively urge that the judgment dismissing the petition for review should be affirmed on the ground that the courts of appeals are without jurisdiction to review Tax Court renegotiation orders on any issue.

> and the production of papers, notice of hearings, hearings before divisions, review by the Tax Court of decisions of divisions, stenographic reporting, and reports of proceedings, as such court has under sections 1110, 1111, 1113, 1114, 1115(a), 1116, 1117(a), 1118, 1120, and 1121 of the Internal Revenue Code in the case of a proceeding to redetermine a deficiency.

It should be noted that there is no reference in this detailed and careful enumeration of applicable Internal Revenue Code provisions to Sections 1141 and 1142, which relate to review of Tax Court tax determinations by the courts of appeals.[6] A reasonable inference from this omission is that Congress did not wish to vest jurisdiction in the courts of appeals over Tax Court renegotiation determinations.[7]

This inference finds support in the legislative history of Section 403 (e). The Tax Court provision first appeared in the Report of the House

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[6] Review of Tax Court renegotiation decisions by the courts of appeals would necessitate reconstruction of the venue provisions of Section 1141(b), since in renegotiation there is no action by any "collector," no "return of the tax in respect of which the liability arises," no "Commissioner" and no "taxpayer," the factors determining venue of review by courts of appeals of Tax Court tax determinations.

[7] The provision of Section 1141(a) (as amended by Section 36 of the Act of June 25, 1948, 62 Stat. 869, revising Title 28) vesting jurisdiction in courts of appeals to review Tax Court determinations "in the same manner and to the same extent as decisions of the district courts in civil actions tried without a jury" obviously is not in conflict (Pet. 22) with the express language of 403(e) in regard to renegotiation determinations, and was not designed to affect the special provisions applicable to renegotiation.

Ways and Means Committee on the bill which became the Revenue Act of 1943 (H. Rep. 871, 78th Cong., 1st sess.). Despite its detailed discussion of the review problem, the Committee made no mention whatever of circuit court action (*id.* at pp. 76 and 77). And although the question as to review was thoroughly discussed by the Houses and committees of Congress, with substantial controversy as to whether the Court of Claims or the Tax Court should review the initial administrative determinations, no suggestion was made at any time that the Tax Court redeterminations would be subject to review by courts of appeals. See 89 Cong. Rec. 9934-9936 (House debates); Hearings, Senate Committee on Finance, 78th Cong., 1st sess., on H. R. 3687, pp. 49, 386, 613, 990, 999, 1000, 1015, 1016, 1017, 1026, 1028, 1032, 1070; S. Rep. 627, 78th Cong., 1st sess., pp. 34, 109-110; 90 Cong. Rec. p. 505 *et seq.* (Senate); H. Rep. 1079, 78th Cong., 2d sess. (Conference report); 90 Cong. Rec. 1300 (Senate), 1351, 1354, 1355 (House).

In addition, it should be noted that when the House Ways and Means Committee was considering H. R. 2628, the bill which extended the termination date of the Renegotiation Act through December 31, 1945, the National Association of Manufacturers proposed that

> 2. Provision should be made for appeals from The Tax Court on questions of law. As in tax cases, disputes arising out of renegotia-

> tion determinations should have benefit of judicial review beyond The Tax Court.[8]

The Committee, after discussion, refused to adopt the proposed amendment (*id.*, pp. 176-187), and the bill so extending the termination date (H. R. 3395, 79th Cong., 1st sess.)—as it was reported from the Committee (H. Rep. 725, 79th Cong., 1st sess.) and as it became law (Act of June 30, 1945, c. 210, 59 Stat. 294)—contained no change in the Tax Court provision.

In these circumstances, since the court below has asserted jurisdiction to review Tax Court renegotiation determinations on certain fundamental issues, petitioner certainly has no basis for complaint.

(b) *Constitutionality:* Congressional denial of appellate scrutiny of alleged errors of the Tax Court in regard to the unreviewed questions of law and fact sought to be raised by petitioner, which questions clearly are not related to jurisdictional or constitutional matters (see *supra*, p. 8), does not violate the Fifth Amendment's due process clause. *Spaulding* v. *Douglas Aircraft Co.*, 154 F. 2d 419, 427 (C. A. 9); *Stein Bros. Mfg. Co.* v. *Secretary of War*, 7 T. C. 863, 882-883. "* * * To learn what the procedure must be in a particular situation, in order to constitute due process, we turn necessarily to the

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[8] Hearings, House Committee on Ways and Means, 79th Cong., 1st sess., on H. R. 2628, p. 222.

decisions of our Court. These tell us that due process does not require that a decision made by an appropriate tribunal shall be reviewable by another. *Pittsburgh, C., C. & St. L. Ry.* v. *Backus,* 154 U. S. 421, 426-427; *Reetz* v. *Michigan,* 188 U. S. 505, 508; *Dohany* v. *Rogers,* 281 U. S. 362, 369. They tell us that due process is not necessarily judicial process. *Murray's Lessee* v. *Hoboken Land & Improvement Co.,* 18 How. 272, 280; *McMillen* v. *Anderson,* 95 U. S. 37, 41; *United States* v. *Ju Toy,* 198 U. S. 253, 263. * * *" *St. Joseph Stock Yards Co.* v. *United States,* 298 U. S. 38, 76-77 (Brandeis, J., concurring). This Court has upheld provisions precluding review of questions comparable to those raised by petitioner in a number of cases. See, as examples, *Crane* v. *Hahlo,* 258 U. S. 142; *Hilton* v. *Merritt,* 110 U. S. 97; *Passavant* v. *United States,* 148 U. S. 214; *United States* v. *Ju Toy,* 198 U. S. 253; *Oceanic Navigation Co.* v. *Stranahan,* 214 U. S. 320; cf. *Williamsport Co.* v. *United States,* 277 U. S. 551; *Heiner* v. *Diamond Alkali Co.,* 288 U. S. 502; see, also, *Switchmen's Union* v. *National Mediation Board,* 320 U. S. 297, 303-304; *Estep* v. *United States,* 327 U. S. 114, 120, 122-123; *St. Joseph Stock Yards Co.* v. *United States,* 298 U. S. 38, 76-82 (Brandeis J., concurring). The validity of the finality provision is even stronger here since the agency issuing the allegedly erroneous order is the Tax Court which has "essentially judicial procedures and experience." *Aircraft & Diesel Corp.*

v. *Hirsch,* 331 U. S. 752, 769; *Dobson* v. *Commissioner,* 320 U. S. 489, 498-499.

2. *Constitutionality of retrospective renegotiation of prime contracts:* Petitioner has never questioned the constitutionality of the prospective application of the Renegotiation Act to prime contracts, and hence accepts as proper the renegotiation of its War Department contract of October 3, 1942 (R. 42). Petitioner also agrees that this Court sustained retrospective renegotiation in *Lichter* v. *United States,* 334 U. S. 742, but it contends that this holding applies only to subcontracts (contracts between private citizens) and not to prime contracts as to which, petitioner claims, decision was reserved (Pet. 32).[9]

(a) That the Court did not limit its holding as to retroactivity in *Lichter* to subcontracts appears from its discussion of that subject, as well as from the simultaneous decision in *Lincoln Electric Co.* v. *Forrestal,* 334 U. S. 841. The *Lichter* section on retrospective application is headed by the general statement: "The Renegotiation Act, including its amendments, has been properly applied to con-

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[9] The sentence in the *Lichter* opinion, on which petitioner's argument that the prime contract question was reserved, reads: "We therefore do not have before us an issue as to the recovery of excessive profits on any contract made directly with the Government nor on any subcontract upon which final payment had been made before April 28, 1942, although relating to war goods made or services performed after the declaration of war, December 8, 1941" (334 U.S., at 788).

tracts entered into before its and their respective enactments"; and the Court, in speaking of the limitation of the Renegotiation Act to future contracts and to contracts already existing but upon which final payments had not been made at the time of the passage of the original Act, expressly refers both to "subcontracts" and to "contracts made directly with the Government." 334 U. S., at 788. The Court also declared the right of the Government to recapture excessive profits "whether they arose from contracts made before or after the passage of the Act. A contract is equally a war contract in either event and, if uncompleted to the extent that the final payment has not yet been made, the recovery of excessive profits derived from it may be authorized as has been done here." 334 U. S., at 789. We believe the only question left open in *Lichter* was whether legislation such as the Renegotiation Act could validly be applied to contracts which had been fully performed and paid for before its enactment. And in the *Lincoln Electric* case, the Court in a *per curiam* opinion disposed of the issue of the constitutionality of the Renegotiation Act in regard to existent prime contracts on the authority of the *Lichter* case, which it decided on the same day.[10]

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[10] Throughout the *Lincoln Electric* litigation, the contractor claimed *inter alia* that the Act could not validly be applied either to its contracts with the War and Navy Departments and the Maritime Commission, in effect from five months to one day prior to April 28, 1942, or to its contracts with the

(b) Apart from the holdings in *Lichter* and *Lincoln Electric*, the Court's reasoning in the former case, sustaining renegotiation of private contracts entered into before April 28, 1942 (see 334 U. S., at 788-789), supports the validity of its retrospective application to prime contracts, such as petitioner's; that case furnishes no basis for the argument that whatever the power of Congress over private contracts the Government is constitutionally barred from altering its own contracts by subsequent legislation or by administrative action pursuant thereto. A renegotiation order generally does not directly alter or modify any terms of the renegotiated contract. On the contrary, as the instant case illustrates (R. 13, 77), the contracts are performed according to their terms and the full contract price is paid; all that happens in renegotiation is that the excessive profits realized on the renegotiable business are required to be repaid (see, *e. g.* R. 15). The recapture of such excessive profits on prime contracts is analogous to a retroactive income tax which may be extended to profits earned under governmental contracts. Cf. *Providence Bank* v. *Billings*, 4 Pet. 514, 561-562;[11] *United States Trust*

Treasury Department which were in effect six months to one month prior to April 28, 1942.

Howell Electric Motors Co. v. *United States*, 172 F. 2d 953 (C.A. 6) also upheld the validity of the Act, and the applicable amendments, as applied to both prime and subcontracts existing on April 28, 1942.

[11] In the *Providence* case, Chief Justice Marshall said (p. 562):

"Land, for example, has, in many, perhaps, in all the states, been granted by government, since the adoption

Co. v. *Helvering,* 307 U. S. 57, 60-61; see *United States* v. *Hudson,* 299 U. S. 498; *Welch* v. *Henry,* 305 U. S. 134; *Lichter* v. *United States,* 334 U. S. 742, 787. There is no reason why recapture of excessive war profits through renegotiation—under the war powers—should be treated more stringently than normal peacetime retroactive income taxation under the taxing power.

Moreover, the due process clause of the Fifth Amendment does not prohibit every congressional modification of the terms of Federal contracts. In *Lynch* v. *United States,* 292 U. S. 571, this Court, despite its invalidation of the statute there involved, recognized that Congress, no less than the states, has power to modify government contracts if "the action taken falls within the federal police power or some other paramount power" (at p. 579).[12] And the exercise of that power in appro-

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of the constitution. The grant is a contract, the object of which is that the profits issuing from it shall inure to the benefit of the grantee. Yet the power of taxation may be carried so far as to absorb these profits. Does this impair the obligation of the contract? The idea is rejected by all; and the proposition appears so extravagant, that it is difficult to admit any resemblance in the cases."

[12] The holding in the *Lynch* case is distinguishable, as the court below noted (R. 960). The statute there invalidated sought to repudiate the obligations expressly assumed in contracts of personal insurance for no better reason than to save the Government money. As this Court commented: "The Solicitor General does not suggest, either in brief or argument, that there were supervening conditions which authorized Congress to abrogate these contracts in the exercise of the police or any other power." 292 U.S. at 579-580. *Perry* v. *United States,* 294 U.S. 330 is similarly distinguishable; the statute there involved specifically undertook to

priate circumstances has been expressly upheld. *Horowitz* v. *United States,* 267 U. S. 458, 461; *North American Commercial Co.* v. *United States,* 171 U. S. 110, 137.[13] In the case of war contracts, the great public interest served by the Renegotiation Act (cf. *Lichter* v. *United States,* 334 U. S., at 754-756, 758-768, 770-772), and the pressing need for its retrospective application serve to validate the application of the Federal Government's "paramount" war powers to preexisting Government contracts, just as to private agreements. On the one hand, the contractor's interest in retaining his profits realized under prime contracts is certainly no greater than the same interest in the case of subcontracts, or as against conventional retro-

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annul a gold-clause obligation inserted in United States bonds, under express congressional authorization, for the purpose of guaranteeing against the very depreciated payment contemplated by the 1933 gold-clause legislation. 294 U.S. at 346-347, 348-349. The instant case would be governed by *Lynch* and *Perry* only if Congress had previously sanctioned the inclusion in war procurement contracts of an undertaking not to renegotiate excessive profits under Government contracts, and then had enacted the Renegotiation Act. (It may also be that the *Perry* case relates only to the federal borrowing power, and does not touch at all the regulation of government matériel-procurement obligations, especially in wartime. See 294 U. S. at 350-4.)

[13] Public contracts of the states are likewise subject to subsequent exertion of State police power. See, for example, *Stone* v. *Mississippi,* 101 U.S. 814 (the withdrawal of the lottery privilege); *Butchers' Union Co.* v. *Crescent City Co.,* 111 U.S. 746 (the cancellation of slaughterhouse monopoly); *Newton* v. *Commissioners,* 100 U.S. 548 (alteration of the site of a county seat); *West River Bridge Co.* v. *Dix,* 6 How. 507, 531; *Butler* v. *Pennsylvania,* 10 How. 402, 416; *Beer Co.* v. *Massachusetts,* 97 U.S. 25, 33; *Ill. Central Rd.* v. *Illinois,* 146 U.S. 387, 454; *Chicago & Alton R. R.* v. *Tranbarger,* 238 U.S. 67, 76.

active income taxation. And on the other hand, the long reach of the war power undoubtedly permits greater interference by the Government with contractual arrangements than peacetime would allow. Cf. *Lichter,* 334 U. S., at 754-758, 765-769, 779-782. The exclusion of the 50 billion dollars of war agreements directly with the Government outstanding on April 28, 1942 (*supra,* p. 6) would have rendered the statute largely nugatory. The need for renegotiating these contracts was more compelling, if anything, than the need for renegotiating subsequent contracts since the contracts were entered into in the rush of early defense or war preparations. A program for the control of war profiteering which did not reach these agreements would scarcely have been effective.

CONCLUSION

The holding of the courts below is clearly correct. There is no conflict of decisions. It is respectfully submitted that the petition for a writ of certiorari should be denied.

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APPENDIX

1. The First Renegotiation Act (Sec. 403 of the Sixth Supplemental National Defense Appropriation Act, 1942, Act of April 28, 1942, c. 247, Title IV, 56 Stat. 226, 245) provides:

> SEC. 403. (a) For the purposes of this section, the term "Department" means the War Department, the Navy Department, and the Maritime Commission, respectively; in the case of the Maritime Commission, the term "Secretary" means the Chairman of such Commission; and the terms "renegotiate" and "renegotiation" include the refixing by the Secretary of the Department of the contract price. For the purposes of subsections (d) and (e) of this section, the term "contract" includes a subcontract and the term "contractor" includes a subcontractor.
>
> (b) The Secretary of each Department is authorized and directed to insert in any contract for an amount in excess of $100,000 hereafter made by such Department (1) a provision for the renegotiation of the contract price at a period or periods when, in the judgment of the Secretary, the profits can be determined with reasonable certainty; (2) a provision for the retention by the United States or the repayment to the United States of (A) any amount of the contract price which is found as a result of such renegotiation to represent excessive profits and (B) an amount of the contract price equal to the amount of the reduc-

tion in the contract price of any subcontract under such contract pursuant to the renegotiation of such subcontract as provided in clause (3) of this subsection; and (3) a provision requiring the contractor to insert in each subcontract for an amount in excess of $100,000 made by him under such contract (A) a provision for the renegotiation by such Secretary and the subcontractor of the contract price of the subcontract at a period or periods when, in the judgment of the Secretary, the profits can be determined with reasonable certainty, (B) a provision for the retention by the United States or the repayment to the United States of any amount of the contract price of the subcontract which is found as a result of such renegotiation, to represent excessive profits, and (C) a provision for relieving the contractor from any liability to the subcontractor on account of any amount so retained by or repaid to the United States.

(c) The Secretary of each Department is authorized and directed, whenever in his opinion excessive profits have been realized, or are likely to be realized, from any contract with such Department or from any subcontract thereunder, (1) to require the contractor or subcontractor to renegotiate the contract price, (2) to withhold from the contractor or subcontractor any amount of the contract price which is found as a result of such renegotiation to represent excessive profits, and (3) in case any amount of the contract price found as a

result of such renegotiation to represent excessive profits shall have been paid to the contractor or subcontractor, to recover such amount from such contractor or subcontractor. Such contractor or subcontractor shall be deemed to be indebted to the United States for any amount which such Secretary is authorized to recover from such contractor or subcontractor under this subsection, and such Secretary may bring actions in the appropriate courts of the United States to recover such amount on behalf of the United States. All amounts recovered under this subsection shall be covered into the Treasury as miscellaneous receipts. This subsection shall be applicable to all contracts and subcontracts hereafter made and to all contracts and subcontracts heretofore made, whether or not such contracts or subcontracts contain a renegotiation or recapture clause, provided that final payment pursuant to such contract or subcontract has not been made prior to the date of enactment of this Act.

(d) In renegotiating a contract price or determining excessive profits for the purposes of this section, the Secretaries of the respective Departments shall not make any allowance for any salaries, bonuses, or other compensation paid by a contractor to its officers or employees in excess of a reasonable amount, nor shall they make allowance for any excessive reserves set up by the contractor or for any costs incurred by the contractor which are excessive

and unreasonable. For the purpose of ascertaining whether such unreasonable compensation has been or is being paid, or whether such excessive reserves have been or are being set up, or whether any excessive and unreasonable costs have been or are being incurred, each such Secretary shall have the same powers with respect to any such contractor that an agency designated by the President to exercise the powers conferred by title XIII of the Second War Powers Act, 1942, has with respect to any contractor to whom such title is applicable. In the interest of economy and the avoidance of duplication of inspection and audit, the services of the Bureau of Internal Revenue shall, upon request of each such Secretary and the approval of the Secretary of the Treasury, be made available to the extent determined by the Secretary of the Treasury for the purposes of making examinations and determinations with respect to profits under this section.

(e) In addition to the powers conferred by existing law, the Secretary of each Department shall have the right to demand of any contractor who holds contracts with respect to which the provisions of this section are applicable in an aggregate amount in excess of $100,000, statements of actual costs of production and such other financial statements, at such times and in such form and detail, as such Secretary may require. Any person who willfully fails or refuses to furnish any statement required of him under this subsection, or who

knowingly furnishes any such statement containing information which is false or misleading in any material respect, shall, upon conviction thereof, be punished by a fine of not more than $10,000 or imprisonment for not more than two years, or both. The powers conferred by this subsection shall be exercised in the case of any contractor by the Secretary of the Department holding the largest amount of such contracts with such contractor, or by such Secretary as may be mutually agreed to by the Secretaries concerned.

(f) The authority and discretion herein conferred upon the Secretary of each Department, in accordance with regulations prescribed by the President for the protection of the interests of the Government, may be delegated, in whole or in part, by him to such individuals or agencies in such Department as he may designate, and he may authorize such individuals or agencies to make further delegations of such authority and discretion.

(g) If any provision of this section or the application thereof to any person or circumstance is held invalid, the remainder of the section and the application of such provision to other persons or circumstances shall not be affected thereby.

(h) This section shall remain in force during the continuance of the present war and for three years after the termination of the war, but no court proceedings brought under this section shall abate by reason of the termination of the provisions of this section.

2. Section 701(b) of the Revenue Act of 1943 (Act of February 25, 1944, c. 63, Title VII, 58 Stat. 21, 78) provides in part:

Section 403 * * *

(e) (1) Any contractor or subcontractor aggrieved by an order of the Board determining the amount of excessive profits received or accrued by such contractor or subcontractor may, within ninety days (not counting Sunday or a legal holiday in the District of Columbia as the last day) after the mailing of the notice of such order under subsection (c) (1), file a petition with The Tax Court of the United States for a redetermination thereof. Upon such filing such court shall have exclusive jurisdiction, by order, to finally determine the amount, if any, of such excessive profits received or accrued by the contractor or subcontractor, and such determination shall not be reviewed or redetermined by any court or agency. The court may determine as the amount of excessive profits an amount either less than, equal to, or greater than that determined by the Board. A proceeding before the Tax Court to finally determine the amount, if any, of excessive profits shall not be treated as a proceeding to review the determination of the Board, but shall be treated as a proceeding de novo. For the purposes of this subsection the court shall have the same powers and duties, insofar as applicable, in respect of the contractor, the subcontractor, the Board and the Secretary, and in respect of the attendance of witnesses and the production of papers,

notice of hearings, hearings before divisions, review by the Tax Court of decisions of divisions, stenographic reporting, and reports of proceedings, as such court has under sections 1110, 1111, 1113, 1114, 1115 (a), 1116, 1117 (a), 1118, 1120, and 1121 of the Internal Revenue Code in the case of a proceeding to redetermine a deficiency. In the case of any witness for the Board or Secretary, the fees and mileage, and the expenses of taking any deposition shall be paid out of appropriations of the Board or Department available for that purpose, and in the case of any other witnesses, shall be paid, subject to rules prescribed by the court, by the party at whose instance the witness appears or the deposition is taken. The filing of a petition under this subsection shall not operate to stay the execution of the order of the Board under subsection (c) (2).

(2) Any contractor or subcontractor (excluding a subcontractor described in subsection (a) (5) (B)) aggrieved by a determination of the Secretary made prior to the date of the enactment of the Revenue Act of 1943, with respect to a fiscal year ending before July 1, 1943, as to the existence of excessive profits, which is not embodied in an agreement with the contractor or subcontractor, may, within ninety days (not counting Sunday or a legal holiday in the District of Columbia as the last day) after the date of the enactment of the Revenue Act of 1943, file a petition with The Tax Court of the United States for a redetermination thereof, and any such contractor or sub-

contractor aggrieved by a determination of the Secretary made on or after the date of the enactment of the Revenue Act of 1943, with respect to any such fiscal year, as to the existence of excessive profits, which is not embodied in an agreement with the contractor or subcontractor, may, within ninety days (not counting Sunday or a legal holiday in the District of Columbia as the last day) after the date of such determination, file a petition with The Tax Court of the United States for a redetermination thereof. Upon such filing such court shall have the same jurisdiction, powers, and duties, and the proceeding shall be subject to the same provisions, as in the case of a petition filed with the court under paragraph (1), except that the amendments made to this section by the Revenue Act of 1943 which are not made applicable as of April 28, 1942, or to fiscal years ending before July 1, 1943, shall not apply.

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